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No. 90-985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,

Petitioners,

—v.—

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF VIRGINIA, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, BILL OF RIGHTS FOUNDATION, CENTER FOR CONSTITUTIONAL RIGHTS, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Virginia is one of its statewide affiliates. The ACLU is committed to the enforcement of the rights of women to reproductive choice and gender equality.

The American Jewish Congress is a membership organization of American Jews founded in 1918 which seeks to protect the religious, political and economic rights of Jews and to promote civil rights and liberties for all Americans. The American Jewish Congress is particularly committed to the principle of sexual equality and to vigorous enforcement of the nation's civil rights laws.

For over 77 years, the Anti-Defamation League of B'nai B'rith (ADL) has pursued the objective set out in its charter "to secure justice and fair treatment to all citizens alike." In order to further this objective, ADL has fought steadfastly to remove barriers which have prevented individuals from fully enjoying the rights protected by federal civil rights laws and the Constitution, including the right to privacy, free speech, freedom of religion and equal protection.

The Bill of Rights Foundation, established in 1965, is a small public foundation dedicated to the protection and defense of civil liberties. The Foundation has provided litigation support to defend individuals or groups whose civil liberties are curtailed or threatened.

The Center for Constitutional Rights is a not-for-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

profit public interest law organization dedicated to providing legal support for progressive movements. It was founded in 1966 by lawyers active in the civil rights movement. It litigated *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206 (1990), which obtained injunctive protection for women whose access to abortion clinics had been denied by Operation Rescue blockades.

People for the American Way (PFAW) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAW now has over 290,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our fundamental freedoms, particularly our First Amendment rights.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The issue posed by this appeal is whether federal courts possess power pursuant to 42 U.S.C. §1985(3), 28 U.S.C. §§1343(1) and (2) and the doctrine of pendent jurisdiction to protect women from unlawful force concededly designed to prevent them from enjoying their rights under state and federal laws.[2] The circumstances which gave rise to this case are similar to those which prompted passage of the Civil Rights Act of April 20, 1871, ch. 22, Section 2, 17 Stat. 13 (Ku Klux Klan Act),

[2] Since petitioners concede that their activity is unlawful, no issue of freedom of expression is raised herein. Although petitioners are fond of Orwellian euphemisms, this is a case about the use of unlawful force.

now 42 U.S.C. §1985(3). Petitioners now, like the Klan in the Reconstruction Era, are "forcibly resisting" efforts to ensure the equal enjoyment and free exercise of constitutional rights by a discrete segment of the population. *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. 825, 836 (1983).

Petitioners have attempted to portray §1985(3) as an arcane thicket. In fact, the statute is an exercise in cooperative federalism designed to reinforçe the capacity of state and local authorities to assure that historically vulnerable segments of society enjoy an equal opportunity to exercise their formal legal rights free from mob rule. The statute is premised on an unfortunate, but accurate, historical understanding that lawless groups, hostile to the exercise of rights by vulnerable segments of society, may seek to destroy the real world value of formal legal rights by the use of force and intimidation. While principal responsibility rests with state and local authorities to deploy the police power to protect vulnerable groups against such lawless behavior, Congress enacted §1985(3) to permit federal courts to assist state and local authorities in assuring that all segments of the community, even the historically most vulnerable, have an equal opportunity to enjoy the benefits of the rule of law.

Petitioners Exhibited A Class Based Animus

Petitioners do not even address whether a gender based animus is cognizable under §1985(3), while the government concedes the point. Brief For the United States As *Amicus Curiae* in Support of Petitioner at 10-11 & n.11. Petitioners instead argue that their actions do not, as a matter of fact, violate the class based animus requirement of §1985(3) because their animus is not against all women but only against those women exercising their rights to abortion, and their supporters, both men and women.

Petitioners are wrong in insisting that class based animus be equated with hostility to the target group. Invidious discrimination does not turn on actual ill will. For example, this Court will not hesitate to strike down sex based classifications as invidiously discriminatory notwithstanding a benign purpose.

Nor is it necessary that the conspirators' animus be directed at every individual member of the class. This kind of reasoning would have permitted defendants in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), to eschew the racial animus behind their conspiracy by praising blacks who knew their place and expressly limiting their acts to those blacks seeking to enjoy the full autonomy guaranteed them by the Constitution. Thus, a mob which closed down a clinic for the treatment of sickle-cell anemia -- sought only by blacks -- could not avoid liability under §1985(3) on the ground that their animus was directed only to the treatment offered at the clinic.

The rights that petitioners concededly seek to destroy are vested in, and are uniquely exercisable by, women.[3] It is petitioners' purposeful decision to engage in an unlawful course of conduct that they know will burden the equal ability of women to enjoy their rights under law that establishes the existence of a class based animus within the meaning of §1985(3).

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[3] Petitioners and the government repeatedly argue that because Operation Rescue interferes with both men and women who assist women seeking abortions, as well as the women themselves, they do not have a gender based animus. In doing so they ignore the Court's unequivocal recognition, in *Scott*, that an "animus against Negroes [included] those who championed their cause." 463 U.S. at 836. Indeed, the Solicitor admits, elsewhere in his brief, that a white civil rights activist would have a cause of action "under §1985(3) if he was the victim of an assault motivated by bias against blacks." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 9 n.9. Men who work to help women realize their right to an abortion are in exactly the same position *vis-a-vis* women as white civil rights workers are to blacks.

Petitioners Hindered The Exercise Of Legal Rights

The Court has also made clear that §1985(3) creates no rights, providing only a remedy for injury to the exercise of independently existing legal rights. *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979). There are two sets of legal rights protected against private interference that are violated by petitioners' lawless acts. First, the ability of thousands of women to travel across state lines in an effort to exercise their constitutional rights is directly impeded by petitioners' use of unlawful force. *Griffin v. Breckenridge*, 403 U.S. 88; *United States v. Guest*, 383 U.S. 745 (1966).

Second, the ability of women to enjoy the equal benefit of Virginia's laws prohibiting criminal trespass, assault and the unlawful use of force is threatened by petitioners' conspiracy. Petitioners' tactics openly depend upon their capacity to temporarily overwhelm local law enforcement agencies' ability to protect the state law rights in question.

There Is Pendent Jurisdiction Over The Claims

Given the strength of the case for federal jurisdiction under 42 U.S.C. §1985(3) and 28 U.S.C. §§1343(1) and (2), and the existence of a powerful alternative basis of federal jurisdiction under 28 U.S.C. §1331 over a cause of action for injunctive relief based directly on the constitutional right to travel, no serious question exists concerning the power of the trial court to issue injunctive relief under Virginia law pursuant to the doctrine of pendent jurisdiction. Moreover, since the American rule on attorneys' fees authorizes an award of attorneys' fees and costs in connection with litigation made necessary by the bad faith conduct of the defendant, no basis exists to disturb the result below, regardless of the outcome of the dispute over the applicability of §1985(3). Accordingly, *amici* question whether this case provides an appropriate vehicle for considering the scope of §1985(3).

ARGUMENT

THE COURT BELOW POSSESSED POWER UNDER 42 U.S.C. §1985(3) AND THE DOCTRINE OF PENDENT JURISDICTION TO ENJOIN PETITIONERS FROM ENGAGING IN LAWLESS MOB ACTION DESIGNED TO DEPRIVE RESPONDENTS OF THEIR EQUAL ENJOYMENT OF THE RULE OF LAW

Petitioners concede that they conspired to use unlawful force to prevent respondents from exercising their rights under state and federal law. They concede that Virginia authorities had a right, indeed a duty, to prevent their unlawful behavior.

Nevertheless, they argue that a federal court lacked power to assist Virginia authorities in protecting respondents' legal rights. Petitioners argue, first, that an unlawful conspiracy directed at women does not fall within the coverage of §1985(3); second, that their conspiracy was not motivated by a class based animus directed at women; and, third, that their conspiracy did not interfere with federally protected rights. Each argument was correctly rejected by the lower courts in this case and by the overwhelming majority of the courts to have confronted the issue.

A. Petitioners' Conspiracy Was Motivated By An Invidiously Discriminatory Animus Toward Women

1. Women Constitute A Cognizable Class Protected Under §1985(3)

This Court has construed the "equal protection . . . equal privileges and immunities" language in §1985(3) to require "some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. at 102. Although the Court has never determined the full extent of the protection of §1985(3), it held in *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, that groups united solely by economic interest did not fall within the protection of the statute. This case does not require the Court to define the parameters of the class based animus requirement, but raises only whether the statute's protection extends to the exercise of fundamental constitutional rights by members of other groups whose immutable characteristics have made them historically vulnerable to invidious discrimination.

When Congress acted in 1871 to provide statutory protection pursuant to Section 5 of the Fourteenth Amendment for the equality values protected by Section 1 of the Fourteenth Amendment, it drew no distinctions among groups vulnerable to invidious discrimination. While racial minorities, whose members have historically been subjected to the type of invidious discrimination that the Fourteenth Amendment sought to eradicate, are the paradigm of groups protected under §1985(3), nothing in the text of §1985(3) or its legislative history justifies a construction that excludes from the statute's protection other groups, such as women, whose history of subordination have rendered them similarly vulnerable to invidious patterns of discrimination. *Reed v. Reed*, 401 U.S. 71 (1971); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

Indeed, the discussion of the applicability of §1985 (3) stressed its inclusive nature. Senator Edwards, the floor manager of the bill in the Senate, noted:

> [If a conspiracy is formed against a person] because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it."

Cong. Globe, 42d Cong., 1st Sess. 567 (1871).

Rep. Buckley, a leading supporter in the House,

stated:

> [t]he proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women . . . .

Cong. Globe, 42d Cong., 1st Sess. 190 (1871).

Not surprisingly, therefore, virtually every federal court to have passed on the issue has recognized that women are within the protection of §1985(3). *New York State NOW v. Terry*, 886 F.2d 1339, 1358-59 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206 (1990); *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984); *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1241-43 (3d Cir. 1978)(*en banc*), *vacated on other grounds*, 442 U.S. 366 (1979); *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).[4]

Alternatively, the class can be described, as it was by the district court, as women seeking abortions. *NOW v. Operation Rescue*, 726 F.Supp. 1483, 1493 (E.D.Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990). That that class does not include all women but only those exercising a particular, fundamental constitutional right, does not make it any less gender based. *See* pp.9-11, *infra*. Nor does it raise the specter petitioners paint of subjecting all political protesters to §1985(3) liability. The standard for establishing a violation of §1985(3) is a stringent one. Petitioners cite to no class based animus in their hypothetical examples of liability for political protests.

[4] *Amici* believe that the United States overstates the concern articulated by Justice Stevens in *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. at 385 & n.7 (Stevens, J., concurring). Justice Stevens noted that §1985(3) did not grant women protection from private acts of sex discrimination because the Equal Protection Clause of the Fourteenth Amendment applies solely to state action. His position was adopted by the Court in *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825. We do not believe that Justice Stevens intended to exclude women from the protection of §1985(3) in the context of rights, such as the right to interstate travel, that run against private persons, as well as the state.

2. The Conspiracy Was Directed At Women

Petitioners deny overt hostility toward women. However, animus need not be hostile to be actionable. This Court's gender discrimination jurisprudence has long recognized that invidious discrimination often results from a benign animus or purpose. *Orr v. Orr*, 440 U.S. 268 (1979); *Mississippi University for Women v. Hogan*, 458 U.S. 718. Moreover, the Court has forcefully reiterated its refusal to permit benign motives to shield purposefully discriminatory treatment of women. *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Craig v. Boren*, 429 U.S. 190 (1976). *See also Taylor v. Louisiana*, 419 U.S. 522 (1975); and *Duren v. Missouri*, 439 U.S. 357 (1979).

Similarly, this Court's recent affirmative action jurisprudence is premised upon a willingness to invalidate practices that are benignly motivated solely because they had an excessively adverse impact on whites. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). *See also Palmore v. Sidoti*, 466 U.S. 429 (1984). Where, as here, a practice that is knowingly and purposefully devastating to the rights of women is at issue, it is far too late in the day to seek shelter in a benign motive.

Petitioners also claim that they lack the requisite class based animus because their actions are directed at abortion, not women. However, because women -- and only women -- seek abortions, petitioners' unlawful con-

spiracy intentionally deprives women -- and only women -- of the enjoyment of full reproductive autonomy.

Petitioners' attempt to rely on *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *General Electric Co. v. Gilbert*, 429 U.S. 115 (1976), is misguided. In those cases, the Court held that the refusal to extend disability *benefits* to normal pregnancy was not *per se* discrimination on the basis of sex. However, the Court retreated from and significantly qualified those rulings in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), when it made clear that imposing *burdens* on women on account of pregnancy was illegal sex discrimination, even if withholding benefits was not. *Id.* at 142. Thus, petitioners' reliance on *Geduldig*, *Gilbert* and *Harris v. McRae*, 448 U.S. 297 (1980), ignores the fundamental distinction between failing to grant women affirmative benefits to deal with the economic consequences of pregnancy and imposing devastating burdens upon them solely because of their reproductive status. In sharp contrast to those cases, all of which involved the extension of economic benefits to pregnancy related conditions, petitioners' unlawful conspiracy is designed to intimidate and coerce women into continuing unwanted pregnancies. Accordingly, it "burdens" women within the meaning of *Satty* "because of their different role" and subjects them to "a substantial burden that men need not bear." 434 U.S. at 142.

Moreover, Congress has expressly repudiated the rationale of *Geduldig*. After the Court extended *Geduldig* to Title VII in *Gilbert*, Congress enacted the Pregnancy Discrimination Act, amending Title VII to make crystal clear that discrimination on the basis of pregnancy is sex discrimination. 42 U.S.C. §2000e(k). S.Rep. No. 331, 95th Cong., 1st Sess. 2-3 (1977); H.Rep. No. 948, 95th Cong., 2d Sess. 2 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4750. Whatever vitality the discredited *Geduldig* rationale may retain in constitutional cases arising directly under the Equal Protection Clause, it may not be applied to deny protection to women invoking statutes enacted by Congress in an effort to combat discrimination. Here, where the question is what constitutes sex based animus for purposes of a civil rights statute, this Court should honor the congressional determination that knowing and purposeful imposition of a burden upon a woman on the basis of pregnancy is discrimination on the basis of sex. *See International Union v. Johnson Controls*, ___ U.S. ___, 111 S.Ct. 1196 (1991); *Newport News Shipbuilding and Drydock Co. v. E.E.O.C.*, 462 U.S. 669 (1983). *See also Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 409 (1972).

Finally, petitioners mistakenly rely on Fourteenth Amendment cases requiring proof of "purposeful" discrimination where facially neutral practices exert a disparate impact on a protected class. *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979). *Feeney* upheld the constitutionality of a gender neutral policy favoring veterans that had a significant adverse impact on women's civil service employment opportunities, but that also affected large numbers of men. It did not approve a course of unlawful conduct, like petitioners', that predictably and purposefully burdens only women and their service providers.

Petitioners confuse the concepts of motive and purpose. Petitioners' motive may be to prevent abortion, but their avowed purpose is to prevent women and their service providers from engaging in a lawful activity that, while abhorrent to petitioners, is of unique significance to women. Petitioners cannot escape liability for the consequences of their intentional conduct by asserting they were doing the right thing in good faith:

> [O]f all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . [T]hose who torment us for our own good will torment us without

end for they do so with the approval of their own conscience.

Downs v. Sawtelle, 574 F.2d 1, 12, n.14 (1978), *quoting* Lewis, The Humanitarian Theory of Punishment, 6 *Res Judicatae* 224, 228 (1952).

B. Petitioners' Conspiracy Impeded The Equal Enjoyment Of Rights Protected Against Private Interference By Federal And State Law

This Court has ruled that the rights at stake in a §1985(3) case must involve prohibitions directed against private conduct, as well as state action. *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825; *Great American Savings & Loan Ass'n v. Novotny*, 442 U.S. 366. In this case, at least two sets of legal rights protected against private interference are violated by petitioners' lawless acts.

1. The Right To Travel

When members of a protected group seek to cross state lines to exercise a constitutionally protected right, they enjoy the protection of §1985(3) against mob violence; it matters not at all whether unlawful force is directed against them before they cross the state line, as they cross the state line, or at the place of their ultimate destination.[5] *E.g.*, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); *In re Debs*, 158 U.S. 564 (1895); *Edwards v. California*, 314 U.S. 160, 171 (1941); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745; *Griffin v. Breckenridge*, 403 U.S. 88; *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Doe v. Bolton*, 410 U.S. 179 (1973); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

The right to interstate travel was first recognized in *Crandall v. Nevada*, 73 U.S. 35, when this Court invalidated Nevada's attempt to tax persons leaving the state. While its constitutional locus has been described in various ways,[6] its central premise is that an inherent corollary of the federal union must be freedom to cross state lines in search of a better life or to exercise a legal right. *Edwards v. California*, 314 U.S. 160; *United States v. Guest*, 383 U.S. at 757, 759. Moreover, it is now clear that the right to interstate travel is "assertable against private as well as governmental interference." *Griffin v. Breckenridge*, 403 U.S. at 105.[7]

The right to travel is also closely related to the right to engage in interstate commerce. Access to commerce is fundamental to the right to travel.[8] Conversely, the freedom to travel is central to the rights protected by the Commerce Clause. The right to engage in interstate commerce would be meaningless if citizens could not

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[5] This case, therefore, raises the issue left open in *Griffin v. Breckenridge*, 403 U.S. at 95-96, as to the correctness of *Collins v. Hardyman*, 341 U.S. 651 (1951), on its facts. Since the plaintiffs in *Collins* did not allege an interference with the right to interstate travel, the *Collins* Court did not pass on its legal significance.

[6] At least three sources of constitutional support have been noted for the right of interstate migration: (1) the Commerce Clause; (2) the privileges and immunities clause; and (3) the inherent nature of the federal union.

[7] Location of the right to travel in the Privileges and Immunities Clause of Article IV, as urged by the Berrigan brief (Berr.Br. at 21-23), would *not* limit the scope of the right only to state interference. Professor Bogen, cited in the Berrigan brief as supporting the inference of the right to travel from Article IV, argues that Article IV provides the "best basis" for securing constitutional protection against *private* interferences with the right to travel. *See* Bogen, "The Privileges and Immunities Clause of Article IV," 37 Case W.L.Rev. 794, 852 (1987).

[8] *See Guest*, 383 U.S. at 757 ("The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union").

travel freely to commercial destinations, free from hindrance linked to their race or sex. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Consequently, the Commerce Clause protects the interstate movement of persons as a component of interstate commerce. *See Guest*, 383 U.S. at 758-59 (1966); *Edwards v. California*, 314 U.S. at 172; *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885).[9] Moreover, the restriction against undue interference with interstate commerce applies to private as well as state action. *See In re Debs*, 158 U.S. at 581 ("If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?").

In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court invalidated a prohibition on publishing information about activities that were unlawful in Virginia but lawful in New York.[10] The clear assumption of the *Bigelow* Court was that persons had a right to receive information about lawful activities in other states in order to determine whether to cross state lines to engage in the activity. Surely, the *Bigelow* Court did not contemplate a federal right to receive information needed to make an informed judgment whether to cross state lines only to have both rights subject to a private veto at the point of destination.

Petitioners seek to escape the unequivocal holdings

[9] The Commerce Clause also protects the right of persons to do business in another state, *see e.g., Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891), and prevents obstructions on the highways of interstate commerce. *See In re Debs*, 158 U.S. at 591.

[10] *Bigelow* dealt with the pre-*Roe v. Wade* situation in which abortions were banned in Virginia, but lawful in New York. The case involved an attempt to punish a Virginia newspaper for running advertisements for New York abortion services.

in *Griffin* and *Debs* that private interference with the right to interstate travel is cognizable under §1985(3) by attempting to impose yet another scienter requirement on the statute. According to petitioners, a conspirator must not only be acting pursuant to a class based animus, he must also have a specific subjective intent to violate the right to travel. But this Court has uniformly rejected attempts to graft specific intent requirements from criminal to civil statutes, recognizing that lawless elements would often be able to escape civil liability by denying the requisite specific intent. Thus, once a conspirator embarks on an unlawful course of conduct aimed a preventing members of a protected class from enjoying their legal rights, the victims are not obliged to show that the conspirators were aiming at a specific right. It is enough that a covered right was impaired. *E.g., Griffin v. Breckenridge*, 403 U.S. at 102 n.10 (1971); *Monroe v. Pape*, 365 U.S. 167 (1961).[11]

In addition, even if some form of specific intent to violate the right to travel were required, petitioners' claims that they had no such specific intent are contradicted by the facts. The intent of those setting up a blockade is, by definition, to deprive others of free movement. Petitioners sought to prevent women seeking health care services from moving into the clinics. Thus, petitioners' claim that the impeding of travel was merely an "incidental" byproduct of their anti-abortion activities

[11] Petitioners' attempt to use the remand instructions in *Griffin*, 403 U.S. at 103, as support for a specific intent requirement is clearly futile. The quoted language was designed to spell out *permissible* patterns of proof on remand; not to establish requirements. The citation to *United States v. Guest*, 383 U.S. at 760, is equally unavailing, since *Guest* is a criminal case. This Court has imposed a modified requirement of specific intent in criminal prosecutions under the Ku Klux Klan Act, but has explicitly refused to do so in civil contexts. *Compare Screws v. United States*, 325 U.S. 91, 106-07 (1945), with *Monroe v. Pape*, 365 U.S. at 187.

lacks merit and is disingenuous at best (Pet.Br. at 30).[12]

While every interference with the successful completion of an interstate trip would not constitute a violation of the right to travel, an interference motivated by a specific intent to frustrate the exercise of a constitutional right would satisfy even the narrowest version of the right.[13]

Petitioners and their *amici* attempt to persuade the Court that a violation of the right to travel can arise only in a few narrow factual contexts (Pet.Br. at 26-27; Berr.Br. at 16-17; U.S.Br. at 24-26). The case law, however, does not support such a limited interpretation of this right. While right to travel violations have been found in cases of discrimination against nonresidents, *see Dunn v. Blumstein*, 405 U.S. 330; *Shapiro v. Thompson*, 394 U.S. 618, and in situations where defendants actually restricted travel across state borders, *see Edwards v. California*, 314 U.S. 160; *Crandall v. Nevada*, 73 U.S. 35, these contexts are by no means the only ones in which the right to travel can be violated.

In *Griffin*, for example, the case most analogous to the present case, the Court held that the defendants deprived the class members of the right to travel in violation of §1985(3), despite the absence of any law or conduct that favored residents over nonresidents. In fact, both plaintiffs and defendants in *Griffin* were Mississippi residents, and the deprivation of rights occurred in Mississippi. 403 U.S. at 89-90. In fact, it has been clear in the law since *Crandall v. Nevada*, 73 U.S. 35, that it is not necessary to discriminate between residents and nonresidents in order to establish a violation of the right to travel.

In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, the Court held that the motel's discrimination implicated the right to travel in interstate commerce despite the fact that one quarter of its customers were state residents. *Id.* at 258. Further, the motel's discriminatory policy was directed at *all* blacks, regardless of their resident status. *Id.* at 243; *see also Katzenbach v. McClung*, 379 U.S. 294, 300 (1964)(restaurant's discrimination implicated right to travel in interstate commerce even though restaurant served mostly local patrons). Thus, the fact that the clinics blockaded by petitioners serve local as well as out of state patients is immaterial for purposes of establishing a right to travel violation.

Finally, petitioners lamely attempt to argue that the right to unimpeded travel ends at a state's border (Pet. Br. at 26). The proper issue here, however, is not whether petitioners sought to prevent class members

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[12] It is important to note that in January, 1989, the United States Court of Appeals for the Second Circuit ruled that Randall Terry and Operation Rescue, through their abortion clinic blockades, did in fact violate §1985(3), in that such activities deprived the women seeking the services of abortion facilities of their constitutional right to travel. *New York State NOW v. Terry*, 704 F.Supp. 1247, 1260 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206 (1990). From that date, petitioners Terry and Operation Rescue were on notice that their activities were in violation of §1985(3), and they continued to engage in those activities. This conduct is certainly relevant here on the issue of intent.

[13] The recognition that persons who cross state lines to engage in constitutionally protected activity are entitled to federal protection under §1985(3) at their respective destinations is wholly consistent with the underpinnings of this Court's right to travel cases. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 215; *Dunn v. Blumstein*, 405 U.S. 330. In granting enhanced constitutional protection to "newcomers," this Court recognized that established residents were more likely to exercise influence on local government than newly arrived persons. Where, as here, private groups seek to use force to prevent "outsiders" from engaging in constitutionally protected activity, no political tie exists between the "outsiders" and the local authorities whose assistance is required to prevent the private acts of lawlessness. Thus, in the context of persons crossing state lines to engage in constitutionally protected activity, the wisdom of providing a federal judicial backstop to local police power is obvious.

from actually crossing a state border.[14] Petitioners acted with the undeniable purpose of preventing women from reaching their ultimate destination, the health care facility that was their very reason for crossing the state line in the first place. Under the clear holdings of this Court, such conduct violates the right to travel.

A right to travel limited to the right to cross state lines would bear little resemblance to the right to travel that this Court has described as "fundamental to the nature of our Federal Union." *Guest*, 383 U.S. at 757. Though petitioners and their *amici* strive in vain to find support for their cramped reading of the right to travel as limited to mere passage across state borders, this Court has consistently described the right to travel in terms that imply no such limitation. *See Kent v. Dulles*, 357 U.S. 116, 126 (1958)("Freedom of movement across frontiers in either direction, *and inside frontiers as well*, was a part of our heritage")(emphasis added); *Williams v. Fears*, 179 U.S. 270, 274 (1900)("the right, ordinarily, of free transit *from or through* the territory of any state is a right secured by the Fourteenth Amendment and by other provisions of the Constitution")(emphasis added). *See also Crandall v. Nevada*, 73 U.S. at 43-45.[15] The result in *Griffin* would have been no different if the defendants had obstructed the movement of the passengers at a point nearer to their destination instead of on the open highway.

[14] While this Court has not explicitly recognized a right to intrastate travel, it has left open the possibility that such a right exists. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255-56 (1974) (whether "to draw a constitutional distinction between interstate and intrastate travel [is] a question we do not now consider . . . ."). In fact, the United States Court of Appeals for the Second Circuit has found such a right. *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990); *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971).

[15] Commentators have also recognized a broad right to travel as being fundamental to this nation's heritage. For example, Professor Chafee, cited in the Berrigan brief, wrote of the historic importance of "freedom of movement across frontiers in either direction and inside frontiers." Chafee, *Three Human Rights in the Constitution of 1787* at 187 (continued...)

2. Section 1331 Jurisdiction Exists To Protect The Right To Travel

Since the federal Constitution provides substantive protection of the right to travel against private interference, either as a privilege and immunity of citizenship, an essential element of federalism, or as a consequence of the right to engage in interstate commerce, a cause of action for prospective injunctive relief for interference with the right to travel springs directly from the Constitution itself, with subject matter jurisdiction granted by 28 U.S.C. §1331. *In re Debs*, 158 U.S. 564; *Ex parte Young*, 209 U.S. 123 (1908); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

While controversy surrounds the implication of a cause of action for damages directly from the Constitution, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), no serious question exists as to the power of a federal court to grant prospective injunctive relief founded directly on the Constitution. *E.g., Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bivens*, 403 U.S. at 400 (Harlan, J. concurring). Thus, a combination of a cause of action springing directly from the constitutional right to travel and general federal question jurisdiction provides an alternative source of power for the trial court's grant

[15] (...continued)
(1956). Sir William Blackstone also discussed a right to travel in broad terms, stating that the personal liberty of individuals "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Blackstone, *Commentaries on the Laws of England* 134 (1856).

of injunctive relief in aid of the right to travel.[16]

3. The Equal Enjoyment Of Rights Under State Law

The rights of women to experience the equal enjoyment of Virginia's laws prohibiting criminal trespass and the unlawful use of force is also threatened by petitioners' conspiracy. The ability to enjoy the security of a civilized society of laws rests, in large part, on the ability to enjoy the fruits of local laws setting forth the minimum standards of personal security -- laws that forbid physical assault and unwanted physical contact; laws that protect against intimidation and coercion. Petitioners knowingly deprived women of the protection of those laws in an effort to deny them the equal enjoyment of citizenship. Indeed, petitioners' tactics openly depend upon their ability to overwhelm and otherwise "hinder" local law enforcement agencies' capacity to protect the state law rights in question.

In *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. at 833, this Court found it unnecessary to decide whether the destruction of rights protecting bodily security granted under state law could be the predicate for §1985(3) protection. Where, however, a private conspiracy purposefully seeks to deprive a protected group of the equal enjoyment of state law rights that are fundamental to the enjoyment of the rule of law, no basis exists to confine the protection of §1985(3) to federally protected rights.

Nothing in the text of §1985(3) or its jurisdictional counterpart, 28 U.S.C. §§1343(1) and (2), suggests that the equal enjoyment of rights under the statute was intended to extend solely to rights granted under federal law. Since Congress confined the reach of its companion statute, now codified as 42 U.S.C. §1983 and 28 U.S.C. §1343(3), to federal rights,[17] the obvious textual conclusion is that Congress intended to protect vulnerable groups from private conspiracies designed to destroy the value of rights under both state and federal law.

Moreover, given the importance of state law rights in 1871, Congress must have intended to include them under §1985(3)'s umbrella. At the time the Ku Klux Klan Act was enacted, no provisions of the Bill of Rights were applicable to the states. *Barron v. City of Baltimore*, 7 Pet. 243, 8 L.Ed 672 (1833). Indeed, the doctrine of "selective incorporation" of the Bill of Rights was fully 60 years in the future. Thus, if the Reconstruction Congress intended §1985(3) to assist newly freed slaves to enjoy many of the fundamental values protected by the Bill of Rights free from Ku Klux Klan violence, it must have intended its protection to attach when unlawful private conspiracies threatened vulnerable persons for exercising rights protected against private interference by state law.

C. The Grant Of Injunctive Relief Must Be Affirmed As An Exercise Of Pendent Jurisdiction

Given the strength of the case for federal jurisdiction pursuant to U.S.C. §1985(3) and 28 U.S.C. §§1343 (1) and (2), and the existence of an alternative source of authority created by a cause of action for equitable relief

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[16] Since general federal question jurisdiction was not conferred on the federal courts until 1875, Congress created no redundancy between §1985(3) and the constitutional cause of action when it passed the Ku Klux Klan Act. In 1871, the constitutional cause of action would have lacked a subject matter base.

Under the prevailing reading of Rule 8, Fed.R.Civ.P., respondents were not obliged to have specifically pleaded §1331 jurisdiction, so long as the facts giving rise to federal jurisdiction were before the court.

[17] *See Maine v. Thiboutot*, 448 U.S. 1 (1980); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1987).

based directly on the constitutional protection of the right to travel and 28 U.S.C. §1331, no serious question exists concerning the power of the trial court to issue injunctive relief under Virginia law pursuant to the doctrine of pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S 715 (1966). In *Oneida Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974), this Court noted that federal courts may exercise pendent jurisdiction over state claims unless the federal claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise so completely devoid of merit as not to involve a federal controversy." While reasonable people may disagree over whether a cause of action exists under §1985(3) or springs directly from the right to travel itself, *amici* do not believe that reasonable people can differ over the substantiality of the arguments in favor of a federal cause of action. Indeed, two circuit courts have recently explicitly endorsed them. Thus, the exercise of pendent jurisdiction by the trial court was unquestionably proper. *See Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909).

Moreover, since the American rule on attorneys' fees authorizes an award of attorneys' fees and costs in connection with litigation made necessary by the bad faith conduct of the defendant, no basis exists to disturb the result below, regardless of the outcome of the dispute over the applicability of §1985(3). Indeed, the strong probability that the Court's decision on the §1985 (3) issue will not affect the result below argues strongly in favor of declining to issue what would be nothing more than an advisory opinion granted to a lawless conspiracy.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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